BEFORE THE PRESIDING OFFICER, CENTRAL GOVERNMENT INDUSTRIAL TRIBUNAL CUM LABOUR COURT-II, ROUSE AVENUE, DISTRICT COURT COMPLEX, DELHI.

Present:

Smt. Pranita Mohanty,
Presiding Officer, C.G.I.T.-Cum-Labour
Court-II, New Delhi.

ATA No. 466(4)2010

M/s Multiscan Co. (P) Ltd. Appellant

VS.

RPFC, Delhi (N) Respondent

ORDER DATED:-25.10.2021

Present:- Shri S.P Arora, Ld. Counsel for the Appellant.
Shri A.K. Verma, Ld. Counsel for the Respondent.

This appeal challenges the order dated 09/07/2010, passed by the APFC Delhi u/s 14B of the EPF and MP Act 1952(herein after referred to as The Act) levying damage of Rs. 12,53,663/- on the appellant establishment for the period 03/1992 to 02/2004. The plea of the appellant taken in the appeal is that it is a Pvt. Ltd. Company duly incorporated under the Companies Act 1956. It was also covered under the EPF Act having code No:-DL-13517. When the establishment was functional the PF contribution of its employees were being diligently deposited. Thereafter, the establishment started incurring losses continuously and became financially sick. As a result thereof it became non functional and ultimately closed down its business. At the time of closure the appellant/establishment had no arrear towards the deposit of PF dues. On 21.07.2005 a summon was served on the appellant/establishment for an inquiry u/s 14Bdirecting the appellant to appear on 08.08.2005. The summon was in connection with an inquiry proposing levy of damage for the aforesaid period on account of alleged belated remittance of the PF dues. One statement was also enclosed with the summon. The establishment appeared before the EPFO Authority and pointed out 46 entries and instances of variation in the dates of deposit as taken by the respondent for the purpose of levy of damage. It was also pointed out that the establishment is not liable for the proposed damage as the payments have been considered from the date of the encashment of the cheque instead of the date of the presentation of the cheque. The appellant/establishment also submitted a detail written submission challenging the 14B proceeding. It was also pointed out that there is some delay in the remittance of the PF dues but those were not

intentional but for the heavy financial hardship encountered by the establishment. It was also submitted that the law provides that the EPF dues are to be deposited on or before the 15th day of the succeeding calendar year with 5 days grace period. But the EPF authority never considered the said submission. The appellant has also urged before the commissioner that the circumstances do not justify imposition of the damage at the maximum rate. The other point raised before the commissioner was that in the light of the departmental circular dated 29th May 1990 the commissioner should not have assessed the damage and calculated the interest separately since the damage assessed by the commissioner itself contains the interest @ 12% as has been held by the Hon'ble High Court of Delhi in the case of System and Stamping vs. EPF Appellate Tribunal and confirmed by the Hon'ble Supreme Court. He thereby submitted that the said revised rates are applicable in respect of all defaults after 1990. Citing various judgments of the Hon'ble Supreme Court and the High Court's the appellant has stated that the quantum of damage is to be determined u/s 14B by the Authority by exercising its discretion having regard to relevant circumstances. Since, all the delays do not automatically attracted liability for damage the commissioner should have considered the factors beyond the control of the employer causing the delay and the motive for delay if was existing then. He has also challenged that the commissioner solenly relying upon the report of the EO came to hold that the establishment is liable for penal damage. The last limb of appellant's stand is that the commissioner had not forwarded the computation of damage alongwith the summon and has not given any finding with regard to the mensrea of the establishment for the said default. Hence, the order passed by the commissioner is patently illegal and liable to be set aside.

The counsel appearing on behalf of the respondent filed his written reply taking a stand that the establishment is under the statutory obligation of depositing the PF dues of the Employees in the capacity of the employer by 15th Day of the succeeding month in which the employee has worked in the establishment and the dues become payable to him. Any effort or action by the employer to deny such legitimate dues of the employee attracts penal damage by the establishment. Even if the employer deposits the omitted amount before commencement of the 14B inquiry it will not exonerate him from the liability. So far as this particular case is concerned the respondent has stated that the during the 14B inquiry the appellant has taken all the stands which has been taken in the appeal. The commissioner gave due consideration to all the points raised and also returned a finding point wise. The respondent has admitted in the reply that the damage u/s14B was levied by taking into account the date of the clearance of the cheque instead of date of presentation of the cheque to the Bank and there is no illegality in such calculation.

Hence, the said plea taken by the appellant is devoid of merit. On behalf of the respondent it has also been stated that the EPF and MP Act under two separate provisions have provided the rate and procedure for imposition of interest and damage. Under no provision of the Act it has been stated that the damage prescribed under Para 32A of the EPF Scheme includes the interest at the rate provided under section 7Q of the Act. Hence, the argument in this regard as advanced by the Ld. Counsel is baseless and the commissioner since has passed a reasoned and well spoken order the said order needs no interference. Thereby the Ld. Counsel for the respondent argued for dismissal of the appeal.

The Ld. Counsel for the appellant during course of argument submitted that the provisions of section 14B after its amendment which came into force w.e.f. 01.09.1991 provided that the Central Government for the default in remittance of the PF dues may recover from the employer by way of penalty such damage not exceeding the amount of arrears as may be specified in the scheme. Since, the damage proposed to be recovered is a penal damage it is obligatory on the part of the assessing authority to give a finding on the mensrea of the employer for the delay in remittance. If no finding in this regard is rendered the order becomes illegal and not sustainable in the eye of law. To support his contention he has placed reliance in the much discussed case of **Mcleod Russel India Limited vs. Regional Provident Fund Commissioner, Jalpaiguri & Others reported in (2014)15 S.C.C 263** and the case of **Assistant Provident Fund Commissioner vs. Management of RSL Textile India Pvt. Ltd., reported in 2017LLR** 337. In his reply argument the Ld. Counsel for the respondent submitted that existence or non existence of the mensrea is a state of mind which can be presumed and inferred from the facts of a given case. In this case the establishment omitted to deposit the contribution for a period more than 10 years and there is no evidence placed on record that during this period the business of the establishment was completely stopped and there were no employees in its pay-roll. This itself proves the mensrea or evil intention of the establishment for escaping the deposit.

The Hon'ble Supreme Court in the case of management of RSL Textile referred supra have clearly held that the commissioner discharging a quasi judicial function is supposed to give a finding on the mensrea and when there is no finding with regard to mensrea or actus reus the order is not sustainable. Thus, the argument advanced by the Ld. Counsel on this point holds a substance and stands against the legality of the impugned order.

The other argument advanced by the Ld. Counsel for the appellant is that there is no straight jacket formula for calculation of damage under the statute and it is a discretionary power vested with

the quasi judicial authority who is required to exercise the same with utmost caution. He thereby submitted that the respondent not only assessed damage but also assessed interest separately which is contrary to the law settled in the case of System and Stamping. He also submitted that in this case the commissioner has attempted to over reach the judgment passed by the Hon'ble Supreme Court in the case of System and Stamping referred supra while passing the order by imposing damage and interest separately. He pinpointed his argument on the ground that the damage has been assessed for the period 03/1992 to 02/2004 at the rate prescribed under Para32A of the scheme. Section 7Q of the EPF and MP Act prescribing interest @12% came into force w.e.f. 01/07/1997. In this case the notice was issued in the year 2007 proposing levy of damage and charging of interest for the period 03/1992 to 02/2004. During that time and also in the year 2010 the rate of damage as prescribed under the Scheme was as follows:-

Period of default	Rate of damages (% of arrears per annum)
a) Less than two months	17
b) Two months and above but less than 4 months	22
c) Four months and above but less than six months	27
d) Six months and above	37

The Hon'ble High Court of Delhi and the Hon'ble Supreme Court in the case of System and stamping have clearly held that the damage prescribed under Para 32A of the scheme effective since 01.09.1991 to 26.09.2008 was inclusive of the interest @ 12% prescribed under section 7Q of the Act. Hence, the commissioner should have assessed the damage excluding the interest or shouldn't have calculated the interest separately. This has caused double jeopardy in the assessment.

In his reply the Ld. Counsel of the respondent submitted that the finding rendered in the case of System and stamping was in respect of the facts of said case and that judgment has no general applicability. He also submitted that the commissioner while passing the order took into consideration this submission of the establishment and observed in the order that section 7Q and section 14B read with Para 32A prescribes for imposition of interest and damage separately and statute and scheme nowhere mandates that the interest prescribed under section 7Q is inclusive of the damage prescribed under Para 32A of the scheme. This argument of the Ld. Counsel for the respondent so also the finding of the commissioner in the impugned order has lost its force for the circular dated 29.05.1990 which is in the nature of a clarification and has been upheld by the Hon'ble Supreme Court in the case of System and Stamping referred supra. In the said circular the EPFO has given a clear direction that the damage

shall be imposed @ 5,10,15,25% of the arrear per annum depending upon the period of default including 12% of interest which makes the percentage of damage 17,22,27,and 37 respectively. In the said circular though it was mentioned that the position shall be reviewed after 6 months, infact the said circular and the rate prescribed u/s 32A w.e.f. 01/09/1991 remained inforce until 26.09.2008 when Para 32Awas amended w.e.f 26.09.2008. Thus, conjunctive reading of section 7Q, 14B of the EPF and MP Act and Para 32A of the EPF Scheme leads to a conclusion that from 01.09.1991 to 26.09.2008 the damage assessed was inclusive of interest @12% and separate calculation of interest makes the impugned order made u/s 14B illegal and not sustainable in the eye of law. Be its stated here that the respondent though has disputed the stand taken by the appellant has nowhere placed any evidence on record to make this tribunal believe that damage assessed was not inclusive of the interest. When the Hon'ble Supreme Court have clearly held that the damage calculated @,17,22,27 and 37 are inclusive of interest and the said judgment has attained finality it is held that the commissioner while imposing damage at the said rate ad interest separately has committed a patent illegality.

It is the allegation of the appellant that when he received the notice of damage raised certain objection with regard to the date of remittance and 46 instances were pointed out where lesser amount of damage could have been levied. Though a written objection to that effect was filed the commissioner never considered the same. He also argued that the Act provides for deposit of the PF contribution on or before 15th Day of the succeeding month and for tendering and collection of the Cheque 5 days grace period has been allowed by the authority. But in this case the authority in order to calculate the delay, computed the period from the date of encashment of the cheque instead of the date of presentation of the cheque which again makes the order illegal. The written objection filed by the respondent contains the admission that the delay was calculated taking into consideration the date of encashment of the cheque and not the date of presentation of the cheque which again makes the impugned order illegal.

Thus, on a careful consideration of the submissions made by the counsel for both the parties and on perusal of the material placed on record and on a mindful reading of the judgments cited by both the parties it is concluded that the commissioner had passed the order without considering the mitigating circumstances i.e. the financial crunch of the establishment, without rendering a finding on the mensrea and by calculating the damage inclusive of the interest when the interest was calculated in a separate order. All these mistakes

makes the impugned order illegal and liable to be set aside. Hence, ordered.

ORDER

The appeal be and the same is allowed on contest and the impugned order passed u/s 14B of the Act levying damage is hereby set aside. Consign the record as per law.

Presiding Officer